SUBJECT INDEX.

(A) PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS OF SIXTH CIRCUIT 1

This suit was before this Court in 1940, and was remanded 1

Summary of Facts which are now material..... 1

The same parties in Ohio courts, and decision of Ohio courts 2

Petitioners contend their vested remainder was accelerated by life tenant's unauthorized sale 4

Respondent's defenses 5

The decision of the U. S. District Court..... 5

The first decision of U. S. Circuit Court of Appeals 5

The decision of this Court..... 5

Questions remanded by this Court to Circuit Court of Appeals..... 5

Reasons why vested remainder was accelerated.. 6

Reasons given by Circuit Court of Appeals for refusing to recognize acceleration, are untenable 8

Grounds assigned for granting the Writ are of Public Importance:

(1) The Circuit Court of Appeals erred in interpreting the decisions of the Supreme Judicial Court of Massachusetts, its decision being in direct conflict with the law repeatedly announced by that Court..... 9

(2) The Circuit Court of Appeals erred in holding acceleration of the remainder would amount to forfeiture of the life estate; its decision on this point being in direct conflict with decision of the Circuit Court of Appeals of the Eighth Circuit..... 9

(3) The Circuit Court of Appeals erred in holding the law of Ohio on acceleration applied, though the wrongful acts which worked acceleration occurred in Massachusetts and New York. Under *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, it is submitted, the lower court was bound to apply the law of these states, not the law of Ohio, the state of the forum..... 10

(B) BRIEF IN SUPPORT OF PETITION..... 11

Opinions of Ohio and Federal Courts in this case 11

Jurisdiction of this Court..... 11

I. The Circuit Court of Appeals erred in misconceiving the law of Massachusetts..... 12

The general rule on acceleration..... 14

The Massachusetts statute relied on cannot apply 15

II. The Circuit Court of Appeals erred in holding acceleration of the remainder would amount to *a forfeiture* of the life estate. Such holding is in conflict with the law of Massachusetts, which law applies..... 16

The doctrine followed in *Marshall v. Vicksburg* (1872) 15 Wallace 146, at 149, which case is cited by the Circuit Court of Appeals in support of its holding *that equity will not enforce a forfeiture,* is not applicable to the instant case; and the decision of the lower court on this point is in direct conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Big Six Development Co. v. Mitchell* (1905) 138 Fed. 279, a lease case..... 16

III. The Circuit Court of Appeals erred in holding sale of *personal property,* by a life tenant without authority to sell, to a bona fide purchaser for value, does not accelerate the vested remainder in the property..... 17

That such sale accelerates the remainder is the rule in Massachusetts and New York, where the wrongs were committed, and in nearly all jurisdictions..... 20

In the instant case the property was corporate stock. The sale by the life tenant was in Massachusetts, the respondent in the first instance issued the certificate of stock in New York, and cancelled the certificate in New York. By the rules of *Conflict of Laws* the law of these States on the legal consequence of a life tenant's unauthorized sale, not the law of Ohio, as held below, applies under *Erie Railroad Co. v. Tompkins* (1938) 304 U. S. 64 20

Acceleration occurs when the life tenant renounces or repudiates, as well as by his death; there is no more effectual way of renouncing the life estate than to sell the property, wherein the life estate existed. 21

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Cases.

American Banana Co. v. United Fruit Co. (1909) 213 U. S. 347..... 19

Big Six Development Co. v. Mitchell (1905) 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332.....10, 16

Burwell v. Burwell's Guardian (1884) 78 Va. 574..... 14

Carpenter v. Denoon (1876), 29 O. S. 379.....8, 17, 18

Christie's Estate, In re (1927) 225 N. Y. S. 777, 130 Misc. 774 20

Coffee v. Wilkerson (1858) 58 Ky. 101..... 14

Commonwealth v. Welcome, 5 Dane's Abridgment of American Law, p. 13..... 15

Erie Railroad Co. vs. Tompkins (1938) 304 U. S. 64 .....2, 9, 10

Hercules Powder Co. v. Rowan (1924) 245 Ill. App. 291 14

Le Forest v. Tolman (1875) 117 Mass. 109..... 19

Leonard v. Stickney (1881), 131 Mass. 541..... 13

Lowry v. Bank (1848), Chief Justice Taney's Decisions, p. 310, at 331..... 19

Marshall vs. Vicksburg, 15 Wallace 146, 149..... 8, 9

Moores v. Wait (1829) 3 Wendell 104, at 108..... 20

Mowatt v. Carow (1938) 7 Paige 328..... 20

Noyes v. Stone (1895) 163 Mass. 490..... 14

Phillips v. Allen (1863), 89 Mass. 115.....12, 13

Potier v. Perry, Inc., 286 Mass. 602, at p. 608, decided in 1934 14

Purdy v. Hoyt (1883) 92 N. Y. 446..... 20

Tabb's Curator v. Cabell (1867), 58 Va. 160..... 14

Taylor v. Wendell (1857) 4 Bradford 324..... 20

United Shoe Machinery Co. v. Holt (1904), 185 Mass. 97 14

Washington R. Co. v. Hickey (1897) 166 U. S. 521.... 20

West vs. American Telephone and Telegraph Co., 311 U. S. 223..... 1

Whitford v. Panama R. R. Co. (1861) 23 N. Y. 465.... 19

Yeager v. Bank (1894) 127 Ky. 751 (a corporate stock case) 14

93 Am. St. Rep. p. 153, Note..... 21

Texts.

33 *American Jurisprudence,* p. 621..... 21

Annotated Cases, 1914 A., p. 856, *Note* on *"Acceleration of Remainders"*..... 20

15 *C. J. S.,* Sec. 12, p. 896..... 19

Albert M. Kales, Future Interests (2nd Ed.) Sec. 599. 17

1 *Pomeroy's Equity Jur.* (4th Ed.) Sec. 381..... 16
Restatement of Conflict of Laws, Sec. 377..... 18
Restatement of Conflict of Laws, Sec. 378, *Comment b* 18
5 *R. C. L.,* Sec. 11, p. 917..... 19
10 *R. C. L.,* pp. 328 to 333..... 16
25 *R. C. L.,* Sec. 281..... 15

Statutes.

Judicial Code, Section 240 (a) (28 U. S. C. A. Section 347) 11
Massachusetts Code, Chapter 184, Section 9..... 15

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CHARLES PEYTON WEST and MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles Peyton West and Maurice John West, respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision rendered by that Court on June 25, 1941, in cause No. 8140, affirming the United States District Court for the Northern District of Ohio, Eastern Division. The opinion of the Circuit Court of Appeals sought to be reviewed, is not yet officially reported, but is part of the Record, and the decree of the District Court which was there affirmed appears on pp. 125, 126 of the Record, and its opinion on pages 116-120 of the Record.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case was before this Court on Certiorari at the October Term, 1940. *West vs. American Telephone and Telegraph Co.,* 311 U. S. 223.

As shown by the opinion of this Court and the mandate, it was then decided, *inter alia,* that a rule of law announced

by the Court of Appeals of Ohio, an intermediate reviewing court, is a datum of what the Ohio law is, under the doctrine of *Erie Railroad Co. vs. Tompkins* (1938) 304 U. S. 64.

As correctly and fully shown in the facts stated in the opinion of this Court, such rule of law was announced by the Ohio Court of Appeals in a case in the state courts between the same parties as the parties in the instant suit, and on substantially the same subject matter.

The rule announced is—*That demand is prerequisite to an action at law* for damages against a corporation by vested remaindermen of shares of its corporate stock, where the corporation, with knowledge of the terms of a will creating a life estate and the vested remainder in the stock, had issued a certificate for the stock to the life tenant in her name without evidencing the remainder on the certificate, and the life tenant thereafter sold the stock without authority to a bona fide purchaser for value, and the corporation then cancelled the certificate in the life tenant's name and issued a new certificate in the name of her bona fide purchaser. The record in the state case did not show such demand, and in consequence the State Court of Appeals dismissed the case, because it thought that, for want of demand, the record did not show a cause of action. The highest Ohio court, the Supreme Court, refused to review the case.

After the decision announcing this rule on demand, and the dismissal of the case, by the Ohio Court of Appeals, and the refusal of the highest Ohio Court to review that decision, demand was made and refused, and this suit was thereupon filed by the remaindermen in the United States District Court, Northern District of Ohio, Eastern Division. This suit filed in the federal court is in Chancery; but, as above stated, it is between the same parties on the same matter except demand and refusal were pleaded and proved—by the vested remaindermen against the corporation. The prayer of the Bill of Complaint is for restitution

to the remaindermen of all rights in the stock which were lost as a result of the wrongful issuance of the certificate to the life tenant, and the sale of the stock by the life tenant, and the corporation's cancellation of the certificate at the instance of her bona fide purchaser, and the then issuance of a new certificate to the purchaser.

The petitioners here are the remaindermen; the testator was Charles P. West, Sr., petitioners' father, whose will was probated and estate administered in Cuyahoga County, Ohio, the life tenant was Grace C. West, the testator's widow and petitioners' stepmother, who is still living; and the corporation that wrongfully issued the stock to the life tenant and then cancelled the certificate, is respondent here.

No new facts were adduced after the remand.

The only facts in the record now material which were not stated in this Court's opinion, are the facts as to the places of the wrongs of respondent, and of the life tenant. The places of the wrongs become important because of the question of *Conflict of Laws* discussed below.

The trial court, that is, the District Court, made findings of fact and conclusions of law. The fourth and fifth Findings of Fact (R. 122) show the places of the wrongs, in words and figures as follows:

> "4. On or about February 2, 1927, there were delivered to the defendant at its transfer office in New York, certificates for 92 shares of common stock of the defendant duly endorsed by Grace C. West as executrix of the estate. Accompanying these certificates were certified copies (1) of her appointment as executrix; (2) of the Last Will and Testament of Charles P. West; (3) of her application for distribution in kind with consent of plaintiffs attached; and (4) of the journal entry of the Probate Court directing distribution to her. On receipt of these documents the defendant issued and delivered to Grace C. West by mail a new certificate in her name for said 92 shares of common stock, without noting thereon any limitation on her estate therein.

"5. On or about October 31, 1929 Grace C. West, then living near Boston, Massachusetts, without the consent and advice of plaintiffs, delivered said certificate for 92 shares to the Boston office of Paine, Webber & Co., brokers, as collateral for her individual account there. Attached to the certificate was an assignment and power of attorney to transfer, duly executed by Grace C. West. The Boston office of Paine, Webber & Co. forwarded the certificate to its New York office and on November 2, 1929, Paine, Webber & Co. delivered the certificate, together with the assignment and power of attorney, to the defendant at its transfer office in New York City and on November 4, 1929 the defendant issued a new certificate for 92 shares to or upon the order of Paine, Webber & Co. Paine, Webber & Co. continued to hold this certificate at New York City as collateral for Grace C. West's account until September 24, 1930, at which time it sold the stock on the New York Exchange and applied the proceeds to Grace C. West's individual account. Neither Paine, Webber & Co. nor the subsequent purchaser from it knew of any limitation upon the right of Grace C. West to sell said shares."

That is, in respect to the question of *Conflict of Laws*, the facts are—

The decedent's will was probated and his estate administered in Cuyahoga County, Ohio;

Respondent wrongfully issued the stock certificate in the life tenant's name in New York;

The life tenant disposed of the stock in Massachusetts; and

Respondent cancelled the West certificate in New York.

Petitioners have consistently contended that the corporation must respond to them on the theory that the life tenant's sale extinguished her life estate, and accordingly accelerated the vested remainder to the immediate use and possession of the remaindermen, as in all cases of a life tenant's disclaimer, or death, or other annihilation of the life estate; and that respondent was chargeable with knowl-

edge of this legal consequence, and should have protected and not cancelled the West certificate on November 4, 1929, when it was presented by the bona fide purchaser for transfer.

In the instant suit—that is in the suit in the federal courts—respondent corporation has insisted on these defenses (R. 123):

(1) *Res judicata*;

(2) Statute of limitations; and

(3) Laches.

The District Court denied all defenses, but held the remainder was *not accelerated*, and trusteed the stock until the life tenant's death (R. 124).

Then the Circuit Court of Appeals, in the first decision in 1939 (108 Fed. 2nd 347), held that federal courts were *not* bound to follow the view of the Ohio Court of Appeals that demand was necessary, and proceeded to decide that the suit was barred by the Ohio statute of limitations, and by laches.

That decision by the Circuit Court of Appeals was reversed by this Court in 1940 (311 U. S. 223), holding, as above stated, that the federal courts should follow the decision of the Ohio Court of Appeals that demand was necessary, as a datum of the law of Ohio on this point; and this Court held further that the suit was not barred by any statute of limitations, or by laches, and remanded the case, using this language in the opinion in respect to the remand—

> "The judgment will be reversed, but as other points involving questions of state law argued here were not passed upon by the Court of Appeals the cause will be remanded to that court for further proceedings not inconsistent with this opinion."

Upon the hearing in the federal Circuit Court of Appeals after the remand, three questions remained to be decided by that Court (Paragraph 1 of Opinion):

(1) Is the decision of the state Court of Appeals *res judicata* of the remaindermen's rights?

On this point the Circuit Court of Appeals agreed with the District Court that there was no *res judicata* on the merits, for the reason that in the instant case in the federal courts the pleadings and evidence supplied the missing element, namely, *demand*, for lack of which the state Court of Appeals dismissed the action; and that only the question of demand was *res judicata*.

(2) Did the life tenant's sale of the stock extinguish her life estate, and accelerate the vested remainder? And

(3) What is the measure of damages in case of acceleration?

The District Court denied acceleration; and the Circuit Court of Appeals likewise denied acceleration. Having refused to recognize acceleration, the measure of recovery was not decided by either court.

In the interest of brevity we omit the reasons given by the District Court for refusing to recognize acceleration.

In orderly sequence, we first state petitioners' reasons for claiming acceleration, and then, the reasons given by the Circuit Court of Appeals in its opinion for refusing to recognize acceleration.

PETITIONERS' REASONS FOR ACCELERATION.

As to acceleration, petitioners' claims are—

(a) That by the rules of *Conflict of Laws* the legal consequence of the tortious sale by the life tenant in Massachusetts, is governed by the law of Massachusetts, because that is the *locus delicti*.

(b) That by the law of Massachusetts *a tortious sale of personal property* by a life tenant extinguishes the life estate, and accelerates a vested remainder to the full possession and use of the vested remaindermen.

(c) That when respondent with knowledge of the will creating the life estate, and the remainder as well, issued the certificate of stock to the life tenant in 1927, without disclosing on the certificate the limited rights of the life tenant, or the remainder rights of petitioners, thus enabling the life tenant freely to dispose of it, respondent was to be charged with the legal consequences of the life tenant's sale wherever she might sell the stock; and when she did sell it in Massachusetts, respondent had to respond to petitioners according to the legal consequences of the sale by the law of that state;

(d) That, if, however, by the rules of *Conflict of Laws*, respondent must respond to petitioners according to the legal consequences of the life tenant's tortious sale, under the law of New York, because respondent's breaches of duty to petitioners occurred in that state, then the remainder is nevertheless accelerated, because the law of New York requires it to be treated as accelerated.

(e) That neither the life tenant, nor the respondent corporation, committed any wrongs in the State of Ohio, and therefore the law of Ohio, whatever the law of Ohio may be on the point of acceleration, cannot conceivably apply; and finally

(f) That the acceleration of the remainder interests necessarily results in the following remedy in chancery—

Restoration of the stock with all mesne dividends from the time of cancellation of the West certificate on November 4, 1929, to the present, interest on such mesne dividends, damages representing the difference in market value of the stock between the time of respondent's cancellation of the certificate in 1929, and the present market value, with interest on the difference.

On the other hand, on the question of acceleration of the vested remainder interests, respondent contends that the law of Ohio applies, and that by the law of Ohio the remainder is not accelerated; two of the three Ohio Court

of Appeals judges having so declared in a dictum in the state case between these parties.

REASONS OF CIRCUIT COURT OF APPEALS FOR DENYING ACCELERATION.

The reasons given in its opinion by the Circuit Court of Appeals for denying acceleration, are these—

(a) If the law of Massachusetts is to be applied, it was held by the Circuit Court of Appeals, the remainder is not accelerated, because, first, the Massachusetts cases cited by petitioners do not apply; and, secondly, a Massachusetts statute prevents acceleration.

(b) Acceleration, it was further held by the Circuit Court of Appeals, would amount to *a forfeiture* of the life estate in equity, the court citing on this point, the case of *Marshall vs. Vicksburg*, 15 Wallace 146, 149.

(c) Without expressly declaring that the law of Ohio governs acceleration in the instant case, or giving reasons why the Ohio law should govern, the Circuit Court of Appeals takes it for granted that the Ohio law is applicable, and proceeds to declare that under the decision by this Court in this case (311 U. S. 223), it is bound by the majority view of the Ohio Court of Appeals in the state case on acceleration.

As shown above, the Ohio Court of Appeals dismissed the case in the state courts for the assigned reason that the record did not disclose demand. This is the only point actually decided by that court.

Two of the three judges constituting the Ohio Court of Appeals did, in their opinion, by way of dictum, discuss the question of acceleration, and declared their view that *Carpenter vs. Denoon*, 29 O. S. 379, a case involving real property only, applied to corporate stock. (R. 75.)

The other one of the three Ohio Court of Appeals judges expressed the view that there *was* acceleration. (R. 79.)

The dictum of the two judges constituting a majority, would doubtless be a datum of the Ohio law on acceleration of the remainder in stock upon sale by the life tenant, if the law of Ohio applied. The question, however, is, can the law of Ohio apply under the rules of *Conflict of Laws*?

The Circuit Court of Appeals observes petitioners urge that a dictum is not a datum under *Erie Railroad Co. v. Tompkins*. Petitioners, it may be noted, do not take this position, and never have. The Court mistook petitioners' position. What we have urged, however, and do still urge, is, that a dictum is not a *decision* amounting to *res judicata* in respect to respondent's defense of *res judicata*. The lower courts having concluded that *res judicata* is not a good defense, we lay this point out of further consideration in this brief.

GROUNDS FOR GRANTING THE WRIT.

The Writ of Certiorari is accordingly sought on these grounds all of which are of *public importance*:

First, the Circuit Court of Appeals misconceived the law of the sovereign state of Massachusetts on the legal consequences of a wrongful sale of personal property by a life tenant. The Court thought such sale did not accelerate the remainder, whereas it would appear from the reported Massachusetts cases, that it does accelerate the remainder; and its decision is therefore *in direct conflict* with the law of that state settled by the pronouncements of its highest judicial court, but it should have been *in accord* with the law of that state.

Secondly, the Circuit Court of Appeals misconceived the decision of this Court in *Marshall vs. Vicksburg*, 15 Wallace 146, erroneously holding this case forbids acceleration of the remainder, for the alleged reason that such acceleration would involve *a forfeiture*, whereas, *Marshall vs. Vicksburg* cannot have any application to the instant case; and, further, as shown in brief in support hereof, the decision of the Circuit Court of Appeals on this point is in

direct conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Big Six Development Company v. Mitchell* (1905) 138 Fed. 279.

Third, the Circuit Court of Appeals misconceived the application of *Erie Railroad Co. vs. Tompkins* (1938) 304 U. S. 64, to the instant case in this, that it supposed it was bound by an announcement made by a majority of the Ohio Court of Appeals on what the law of Ohio is on acceleration.

The Court is in error on this point, because the wrongs complained of did not occur in Ohio, but occurred in Massachusetts and New York, and, it is submitted, the law of these states must therefore govern. By the law of both these states the remainder is accelerated in the circumstances here under consideration. But the Ohio Court of Appeals did not declare what the law of these states is.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and transmit to this Honorable Court a full and complete transcript of the record of said cause numbered and titled on its docket as: "Charles Peyton West and Maurice John West, Appellants, vs. The American Telephone and Telegraph Company, Appellee. Appeal No. 8140," and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners be given a final decree establishing the rights for which they prayed in the Bill of Complaint filed in the District Court and to which they are entitled under the facts and law.

Respectfully submitted,

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